

Mr. Robert Frank  
Excise Tax Unit

April 29, 1988

Lawrence A. Augusta  
Assistant Chief Counsel

Application of Hazardous Substances Tax to  
Banks and Financial Corporations

This is in response to your memo of January 22, 1988 asking for my opinion as to whether the hazardous substances fees apply to banks and financial institutions. I am embarrassed by the length of time that it has taken to respond to your inquiry and I hope you will accept my apologies for the delay.

For the reasons stated hereinafter, it is my opinion that banks and financial institutions are not subject to the various hazardous substances fees by virtue of the provisions of Revenue and Taxation Code section 23182, which provides for an in lieu tax to be imposed on those institutions.

The State of California has enacted a series of taxes and fees to provide funds for the management of the disposal, generation and cleanup of hazardous substances. Included among these are the land disposal fee (Health & Safety Code § 25174), the facility fee (H&S Code § 25205.2), the generator fee (H&S Code § 25205.5); and, the state superfund tax (H&S Code § 25345). The Board is charged with the responsibility of administering the fees and taxes in cooperation with the Department of Health Services, which is responsible for the management of the hazardous waste programs. In the course of this administration, the Board, using lists supplied by the Department of Health Services, sent notices to potential generators and disposers of hazardous substances, including a number of national banks and other financial institutions. The Bank of California responded to this notice claiming exemption from the hazardous substances taxes and fees because of the imposition of the in lieu tax imposed on banks and financial corporations under Rev. & Tax. Code § 23182. We are conceding that the superfund tax (H&S Code § 25345) is a tax to which the banks are not subject, and it is not discussed in this opinion. At issue are the other three fees which are imposed on disposers, generators and facilities.

As a general proposition, all hazardous substance generators, disposers and facility operators would be subject to the fees in question, unless specifically exempt. Article XIII, section 27 of the California Constitution provides that the Legislature may impose a tax on corporations, and unless otherwise provided by the Legislature, "... the tax on state and national banks ... shall be in lieu of all other taxes and license fees upon banks or their shares, except taxes upon real property and vehicle registration and license fees." The Legislature, in implementing this Constitutional provision, has provided in section 23182 of the Revenue and Taxation Code as follows:

"23182. The tax imposed under this part upon banks and financial corporations is in lieu of all other taxes and licenses, state, county and municipal, upon the said banks and financial corporations except taxes upon the real property, local utility user taxes, sales and use tax, state energy resources surcharge, state emergency telephone users surcharge, and motor vehicle and other vehicle registration license fees and any other tax or license fee imposed by the state upon vehicles, motor vehicles or the operation thereof...."

The section was amended in 1979, among other changes not relevant here, to make it clear that banks and financial corporations were subject to certain specified taxes, namely, local utility users taxes, sales and use taxes and the energy and emergency telephone surcharges. This amendment could provide an easy answer to your question, as one could stop at this point and conclude that only taxes and fees enumerated in the section must be paid by banks; they are exempt from all other taxes and fees. However, a dilemma is posed by the fact the fees in question were not in existence at the time. On the one hand, one could conclude from the fact of non-existence that the Legislature could not have intended, at that time, that the banks pay the fees. A logical extension of this line of thought is that the hazardous substances fees should be added to the list of taxes and surcharges in section 223182 if the Legislature believes the fees should be paid by banks and financial corporations. On the other hand, the fact the hazardous substances fees in question were not in existence at the time, means the legislature could not have taken them into account in enumerating the taxes which banks and financial corporations must pay. Because they are similar to the taxes enumerated, however, we could conclude the Legislature intended banks to pay all such miscellaneous taxes.

The dilemma is extended and complicated by the fact the exceptions to the in lieu tax enumerated in § 23182 are all clearly taxes, and the hazardous substance fees are not. The Legislature has attempted to construct the hazardous substances exactions as fees for funding regulation. Thus, I choose to view § 23182 as inconclusive as to the fees in question, and to look beyond the narrow words of that statute to find a firm answer to our question.

Let us assume for purposes of the following discussion that the fees in question are not "taxes." Thus, our question becomes whether the hazardous substances fees are "license fees" within the meaning of Section 23182. To answer this question, we must define what is a tax, what is a license, what is a license fee, and see where the hazardous substances fees fit in the general scheme.

In the most general sense, "taxes" raise general revenues for government to pay for a variety of public services, and a distinction is drawn between taxes, special taxes, special assessments, and licenses. A special tax is a tax collected and earmarked for a special purpose rather than being deposited in a general fund. A special assessment is charged on real property to pay for specific benefits that that property has received from improvements, and strictly speaking, is not a tax at all. (See County of Fresno v. Malmstrom (1979) 94 Cal.App.3d 974, 983.

A license fee may be imposed to regulate, to raise revenue or a combination of both. According to California Jurisprudence third edition:

"Licensing Ordinances may regulate or raise revenue, or both. The license fee, which is generally required, may thus be a charge for the purpose of covering the cost of administering the regulatory provisions of the ordinance, may be a tax on the privilege of engaging in a business or occupation, or may be a combination of the two. It has been stated by some authorities that the license fee or charge for regulatory purposes only is in no sense a tax, and it may be conceded that this is technically correct. But the term "license tax" has often been used in this state by both the legislature and the courts as including license charges imposed for regulatory purposes, and there seems to

be no doubt that in its popular meaning the term includes any charge imposed for a license whether the object be regulation, revenue, or both. The connection in which the term is used in a particular case may properly be looked to for the purpose of determining its intended scope."  
(11 Cal.Jur.3d, Business and Occupation Licenses § 7).

Despite the seeming importance of this distinction and the meaning of the term "license" in Article XIII, Section 27, and Section 23182, there have been virtually no reported cases defining those terms. In those cases which have been reported, the issue has been whether the tax has been imposed for regulatory purposes or for revenue purposes, and consequently whether a local ordinance is regulating an activity in a field which has been preempted by the state. This issue is not important here.

The hazardous substances scheme of taxation is intended to provide sufficient revenues for the administration of the toxics substances control program. Inasmuch as the entire scheme involves the issuing of permits to operate hazardous waste treatment, storage and disposal facilities in California, it is my conclusion that the fees involved are license fees of the character intended for regulation and not for raising revenues. The fees are intended to cover the costs and expenses of supervision or regulation. They are not license fees of the character paid for the privilege of engaging in and pursuing a particular calling or occupation as a revenue measure.

It is interesting to note the conclusion in the only case specifically dealing with this issue, Citrus Belt Savings and Loan v. Franchise Tax Board (1963) 218 Cal.App.2d 584. The court, after reviewing the distinction between a license fee as a tax for general revenue and a regulatory charge for sufficient funds to cover the cost of regulation, decided that the assessments against savings and loans under Financial Code sections 5300 and 5301 were not taxes or licenses as that term is used in Article XIII, Section 16 (now 27), or in Section 23182 of the Revenue and Taxation Code. Financial Code Sections 5300 and 5301 at that time provided for a charge against savings and loans and other financial corporations to cover the salaries and expenses incurred in the regulation of the associations.

While the fees in the Citrus Belt S&L case are similar to the fees here, I find a distinction because the Legislature specifically imposed those fees for the supervision of savings

and loans to which they applied. In the case of the hazardous substances fees, the fees are for the regulation of hazardous substances generally, and are not fees specifically to regulate the specific type of institution to which they are applied. Further, given their unique and specific nature, they could be considered exceptions which the Legislature has "otherwise provided" within the meaning of Section 23182.

I do not consider this conclusion to be inconsistent with our position with respect to the application of the hazardous substances fees to federal instrumentalities. Here we are dealing with a specific exemption provided in state law, there we are considering the interaction of federal constitutional immunity and a federal statutory exception to that immunity. Further, the federal statute on which we base our position regarding federal agencies provides that federal instrumentalities may pay reasonable "service" charges imposed by states respecting the control and abatement of solid waste or hazardous waste. The term "service charges" is not defined in California law. However, I am, in essence, deciding that service charges are equivalent to license fees imposed for regulatory purposes. In reaching this conclusion, I am guided in part by Government Code Section 50076 which creates a de facto definition of "service fee" by excluding from the definition of "special tax" any fee which does not exceed the reasonable cost of providing a service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes. This is precisely what we are saying that the hazardous substances fees are, and that is why they are equivalent to the reasonable service charges which 42 USCA 6961 provides that departments, agencies and instrumentalities of the federal government may pay to states.

LAA:ss

cc: Ms. Judy Agan  
Mr. E. V. Anderson  
Ms. Oveta Riffle